International Law and the Arab-Israel Conflict

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Extracts from "Israel and Palestine – Assault on the Law of Nations"

by Julius Stone

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The late Professor Julius Stone was recognised as one of the twentieth century's leading authorities on the Law of Nations. Israel and Palestine, which appeared in 1980, presented a detailed analysis of the central principles of international law governing the issues raised by the Arab-Israel conflict. This summary provides a short outline of the main points in the form of extracts from the original work. Also included in this second edition are extracts from the subsequent international documents, and updated commentary.

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PREFACE TO THE 2003 EDITION

Israel and Palestine was written by Julius Stone in 1980, and the first edition of this short summary appeared in 1990. Since then the rights of the parties have been modified by agreement, and the optimism which followed the various agreements has been succeeded by violent conflict. This second edition therefore appears in a climate in which legal assertions are once again a central part of the political discourse, a context which has renewed the relevance of Professor Stone's clear analysis of the status under international law of the Territories which came into Israel's possession in 1967.

A new section has been added which deals with the effect on the legal status of the Territories of the Oslo Accords, the Israel-Jordan Peace Treaty and the "Roadmap", in the form of documentary extracts.

There is also a further section comprising extracts from the international instruments relating to the revived Palestinian claim to a "right of return".

The writer is grateful for the suggestions of David D. Knoll, author of The Impact of Security Concerns upon International Economic Law and Peter J. Wertheim, author of Unlawful Coercion and the Law of Treaties: the case of Syria and Lebanon.

This booklet is, of course, a mere description of the legal position, and it charts no course for the future. However it is hoped that this summary will contribute to a more general

understanding of the basic issues.

Ian Lacey

Part 1

THE LEGAL STATUS OF THE TERRITORIES

Julius Stone examines the principles governing legal title to the Territories known as the Gaza Strip and the "West Bank", which are part of the territory which came into Israel's possession during the war of 1967. In his analysis Stone draws upon the writings of Professor Stephen Schwebel, the former Chief Judge of the International Court of Justice.

Since Stone wrote, the legal status of the Territories has been affected by the agreements implementing the Oslo Accords of 1993, which provide for a sharing of governmental powers in the Territories with the Palestinian Authority, with specified security powers reserved to Israel (See Part 5). However those agreements are on an interim basis, pending and subject to the negotiation of a "permanent status agreement", and they leave the underlying legal title intact.

Also the peace treaty of 1994 now sets the international boundary between Israel and Jordan at the centre of the Jordan river, "without prejudice to the status of [the] Territories".

The Self-Defence Principle

The basic precept of international law concerning the rights of a state victim of aggression, which has lawfully occupied the attacking state's territory in the course of self-defence, is clear. And it is still international law after the Charter, which gave to the UN General Assembly no power to amend this law. This precept is that a lawful occupant such as Israel is entitled to remain in control of the territory involved pending negotiation of a treaty of peace.

Both Resolution 242 (1967) and Resolution 338 (1973), adopted by the Security Council after respective wars of those years, expressed this requirement for settlement by negotiations between the parties, the latter in those words. Conversely both the Security Council and the General Assembly in 1967 resisted heavy Soviet and Arab pressures demanding automatic Israeli withdrawal to the pre-1967 frontiers. Through the decade 1967-1977, Egypt and her Arab allies compounded the illegality of their continued hostilities by proclaiming the slogan "No recognition! No Peace! No negotiation!" thus blocking the regular process of international law for post-war pacification and settlement…

Israel's territorial rights after 1967 are best seen by contrasting them with Jordan's lack of such rights in Jerusalem and the West Bank after the Arab invasion of Palestine in 1948. The presence of Jordan in Jerusalem and elsewhere in cis-Jordan from 1948 to 1967 was only by virtue of her illegal entry in 1948. Under the international law principle ex iniuria non oritur ius she acquired no legal title there. Egypt itself denied Jordanian sovereignty; and Egypt never tried to claim Gaza as Egyptian territory.

By contrast, Israel's presence in all these areas pending negotiation of new borders is entirely lawful, since Israel entered them lawfully in self-defence. International law forbids acquisition by unlawful force, but not where, as in the case of Israel's self-defence in 1967, the entry on the territory was lawful. It does not so forbid it, in particular, when the force is used to stop an aggressor, for the effect of such prohibition would be to

guarantee to all potential aggressors that, even if their aggression failed, all territory lost in the attempt would be automatically returned to them. Such a rule would be absurd to the point of lunacy. There is no such rule….

International law, therefore, gives a triple underpinning to Israel's claim that she is under no obligation to hand back automatically the West Bank and Gaza to Jordan or anyone else. In the first place, these lands never legally belonged to Jordan. Second, even if they had, Israel's own present control is lawful, and she is entitled to negotiate the extent and the terms of her withdrawal. Third, international law would not in such circumstances require the automatic handing back of territory even to an aggressor who was the former sovereign. It requires the extent and conditions of the handing back to be negotiated between the parties.

Competing Claims to Title

Because the Jordanian entry onto the West Bank and East Jerusalem in 1948 was an unlawful invasion and an aggression, the principle ex iniuria non oritur ius beclouded even Jordan's limited status of belligerent occupant. Her purported annexation was invalid on that account, as well as because it violated the freezing provisions of the Armistice Agreement. Conversely Israel's standing in East Jerusalem after her lawful entry in the course of self-defence certainly displaced Jordan's unlawful possession.

Once this position is reached, and it is remembered that neither Jordan nor any other state is a sovereign reversioner entitled to re-enter the West Bank, the legal standing of Israel takes on new aspects. She becomes then a state in lawful control of territory in respect of which no other state can show better (or, indeed, any) legal title. The general principles of international law applicable to such a situation, moreover, are well-established. The International Court of Justice, when called upon to adjudicate in territorial disputes, for instance in the Minquires and Echrehos case between the United Kingdom and France, proceeded "to appraise the relative strength of the opposing claims to sovereignty". Since title to territory is thus based on a claim not of absolute but only of relative validity, the result seems decisive in East Jerusalem. No other state having a legal claim even equal to that of Israel under the unconditional cease-fire agreement of 1967 and the rule of uti possidetis, this relative superiority of title would seem to assimilate Israel's possession under international law to an absolute title, valid erga omnes…

The most succinct statement of this position is in Professor Stephen Schwebel's What Weight to Conquest? published in 1970, before he entered U.S. government service. He points out that the answer to that question in terms of international law, after the Charter's prohibitions of the use of force, makes necessary a vital distinction "between aggressive conquest and defensive conquest, between the taking of territory legally held and the taking of territory illegally held":

> "Those distinctions may be summarized as follows:
> a) A state acting in lawful exercise of its right of self-defence may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defence.
> b) As a condition of its withdrawal from such territory, that state may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use force against it of such a nature as to justify exercise of self-defence.
> c) Where the prior holder of the territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."

Note:

The issues discussed in this section have continuing relevance in the context of current assertions that Israeli presence in the Territories constitutes an "illegal occupation". Such assertions ignore both Israel's underlying right to lawful possession of the Territories as outlined by Stone, and the specific rights reserved to Israel in the interim power-sharing agreements under the Oslo Accords, as extracted in Part 5.

As Stone remarks a state victim of aggression is entitled to protect itself by retaining lawful possession of territory taken in self-defence from a defeated aggressor. The dismemberment of Germany after two world wars, as a protection against any repeated aggression, is a classic example of the operation of the customary law.

The legal principle is reflected in Article 75 of the Vienna Convention on the Law of Treaties, which declares that the provisions of the Convention governing the validity of treaties are "are without prejudice to any obligation…which may arise for an aggressor State" in consequence of measures taken by the victim of the aggression in lawful self-defence.

In the case of the Territories the relevant historical background includes the Arab invasion of Israel in 1948, continuing armed incursions by irregular forces after the armistice agreements of 1949, and the naval blockade and the massing of the armed forces of Egypt, Jordan, Syria and Iraq in preparation for a further invasion in 1967. As President Gamal Abdel Nasser declared to the Egyptian parliament at the time:

"The problem before the Arab countries is not whether the port of Eilat should be blockaded or how to blockade it — but how totally to exterminate the State of Israel for all time".

It is thus the historical context itself which makes it inconceivable that the Israeli presence in the Territories could be characterized as "illegal". If this were so, then Israel would be bound to withdraw unilaterally from the whole of the Territories, and without any peace agreement, security guarantees or border adjustments. As Stone points out, this would then negate the whole basis for the negotiation of a peaceful settlement with "secure and recognized boundaries" as contemplated by UNSC Resolution 242.

Part 2

SOVEREIGNTY IN JERUSALEM

The Partition Plan of 1947 envisaged an international Jerusalem, separated from both Israel and the then proposed Palestinian State. During the 1948 war, East Jerusalem (which includes the holy places of Judaism, Christianity and Islam in the old city) came into Jordanian hands; and Jordan claimed sovereignty. In 1967, after Jordan launched an attack on West Jerusalem, the whole of Jerusalem came under Israeli rule; and Israel claimed sovereignty over a united Jerusalem. Professor Stone examines the legal principles which apply, and considers the analysis of Professor Elihu Lauterpacht, the distinguished editor of the authoritative "Oppenheim's International Law".

The agreements implementing the Oslo Accords provide that Jerusalem is one of the issues to be considered in the permanent status negotiations, and failure to reach agreement on the sharing of administration in Jerusalem was one of the reasons for the failure to conclude a permanent status agreement at Camp David II and at Taba in 2000. In the absence of such agreement, however, sovereignty over Jerusalem under international law remains as described by Stone.

The Effect of the Partition Plan

Elihu Lauterpacht concludes, correctly that the 1947 partition resolution had no legislative character to vest territorial rights in either Jews or Arabs. Any binding force of it would have had to arise from the principle pacta sunt servanda, that is, from the agreement of the parties concerned to the proposed plan. Such an agreement, however, was frustrated ab initio by the Arab rejection, a rejection underlined by armed invasion of Palestine by the forces of Egypt, Iraq, Lebanon, Syria and Saudi Arabia, timed for the British withdrawal on May 14, 1948, and aimed at destroying Israel and at ending even the merely hortatory value of the plan…

The State of Israel is thus not legally derived from the partition plan, but rests (as do most other states in the world) on assertion of independence by its people and government, on the vindication of that independence by arms against assault by other states, and on the establishment of orderly government within territory under its stable control. At most, as Israel's Declaration of Independence expressed it, the General Assembly resolution was a recognition of the natural and historic right of the Jewish people in Palestine. The immediate recognition of Israel by the United States and other states was in no way predicated on its creation by the partition resolution, nor was its admission in 1949 to membership in the United Nations…

As a mere resolution of the General Assembly, Resolution 181(11) lacked binding force ab initio. It would have acquired the force under the principle pacta sunt servanda if the parties at variance had accepted it. While the state of Israel did for her part express willingness to accept it, the other states concerned both rejected it and took up arms unlawfully against it. The Partition Resolution thus never became operative either in law or in fact, either as to the proposed Jerusalem corpus separatum or other territorial dispositions in Palestine.

The Corpus Separatum Concept

We venture to agree with the results of the careful examination of the corpus separatum proposal by E. Lauterpacht in his monograph Jerusalem and the Holy Places:

> "(1) During the critical period of the changeover of power in Palestine from British to Israeli and Arab hands, the UN did nothing effectively to implement the idea of the internationalization of Jerusalem.
> (2) In the five years 1948-1952 inclusive, the UN sought to develop the concept as a theoretical exercise in the face of a gradual realization that it was acceptable neither to Israel nor to Jordan and could never be enforced. Eventually the idea was allowed quietly to drop.
> (3) In the meantime, both Israel and Jordan demonstrated that each was capable of ensuring the security of the Holy Places and maintaining access to and free worship at them – with the exception, on the part of Jordan, that the Jews were not allowed access to Jewish Holy places in the area of Jordanian control.
> (4) The UN by its concern with the idea of territorial internationalization, as demonstrated from 1952 to the present date (1968) effectively acquiesced in the demise of the concept. The event of 1967 and 1968 have not led to its revival.
> (5) Nonetheless there began to emerge, as long ago as 1950, the idea of functional internationalization of the Holy Places in contradistinction to the territorial internationalization of Jerusalem. This means that there should be an element of international government of the City, but only a measure of international interest in and concern with the Holy Places. This idea has been propounded by Israel and has been said to be acceptable to her. Jordan has not subscribed to it."

Even if no notion of a corpus separatum had ever floated on the international seas, serious questions about the legal status of Jerusalem would have arisen after the 1967 War. Did it have the status of territory that came under belligerent occupation in the course of active hostilities, for which international law prescribes a detailed regime of powers granted to the occupying power or withheld it from in the interest of the ousted reversionary sovereign? Or was this status qualified in Israel's favour by virtue of the fact that the ousted power, in this case, Jordan, itself had occupied the city in the course of an unlawful aggression and therefore could not, under principle of ex iniuria non oritur ius, be regarded as an ousted reversioner? Or was Jerusalem, as we will see that a distinguished authority thought at the time, in the legal status of res nullius modo juridico? That is, was it a territory to which by reason of the copies of international instruments, and their lacunae, together with the above vice in the Jordanian title, no other state than Israel could have sovereign title? The consequence of this could be to make the legal status of Jerusalem that of subjection to Israel sovereignty.

Acquisition of Sovereignty

This analysis, based on the sovereignty vacuum, affords a common legal frame for the legal positions of both West and East Jerusalem after both the 1948-49 and the 1967 wars. In 1967, Israel's entry into Jerusalem was by way lawful self-defence, confirmed in the Security Council and General Assembly by the defeat of Soviet and Arab-sponsored resolutions demanding her withdrawal…

Lauterpacht has offered a cogent legal analysis leading to the conclusion that sovereignty over Jerusalem has already vested in Israel. His view is that when the partition proposals were immediately rejected and aborted by Arab armed aggression, those proposals could not, both because of their inherent nature and because of the terms in which they were framed, operate as an effective legal re-disposition of the sovereign title. They might (he thinks) have been transformed by agreement of the parties concerned into a consensual root of title, but this never happened. And he points out that the idea that some kind of title remained in the United Nations is quite at odds, both with the absence of any evidence of vesting, and with complete United Nations silence on this aspect of the matter from 1950 to 1967…

In these circumstances, that writer is led to the view that there was, following the British withdrawal and the abortion of the partition proposals, a lapse or vacancy or vacuum of sovereignty. In this situation of sovereignty vacuum, he thinks, sovereignty could be forthwith acquired by any state that was in a position to assert effective and stable control without resort to unlawful means. On the merely political and commonsense level, there is also ground for greater tolerance towards Israel's position, not only because of the historic centrality of Jerusalem to Judaism for 3,000 years, but also because in modern times Jews have always exceeded Arabs in Jerusalem. In 1844 there were 7,000 Jews to 5,000 Moslems; in 1910, 47,000 Jews to 9,800 Moslems; in 1931, 51,222 Jews to 19,894 Moslems; in 1948, 100,000 Jews to 40,000 Moslems, and in 1967 200,000 Jews to 54,902 Moslems.

Part 3

THE GENEVA CONVENTIONS AND THE LEGALITY OF THE SETTLEMENTS

It is often claimed that settlement by Jews in the administered territories is in breach of the Fourth Geneva Convention. Professor Stone was the author of the treatise "Legal Controls of International Conflict", which included an extensive commentary on the Geneva Conventions. Here he discusses their applicability in the Territories.

Perhaps the central current criticism against the government of Israel in relation to its administration of the territories occupied after the 1967 War concerns its alleged infractions of the final paragraph (6) of Article 49, of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949. The preceding paragraphs deal with deportation or transfer of a population out of the occupied territory. The final paragraph (6) reads as follows. "The occupying Power shall not deport or transfer parts of its own civilian population into territory it occupies."

It has been shown that there are solid grounds in international law for denying any sovereign title to Jordan in the West Bank, and therefore any rights as reversioner state under the law of belligerent occupation…

[Note: By the Peace Treaty of 1994 Jordan relinquished any claim to such sovereignty, and the argument which follows therefore applies a fortiori.]

Not only does Jordan lack any legal title to the territories concerned, but the Convention itself does not by its terms apply to these territories. For, under Article 2, the Convention applies "to cases of … occupation of the territory of a High Contracting Party, by another such Party". Insofar as the West Bank at present held by Israel does not belong to any other State, the Convention would not seem to apply to it at all. This is a technical, though rather decisive, legal point.

It is also important to observe, however, that even if that point is set aside, the claim that Article 49 of the convention forbids the settlement of Jews in the West Bank is difficult to sustain.

It is clear that in the drafting history, Article 49 as a whole was directed against the heinous practice of the Nazi regime during the Nazi occupation of Europe in World War II, of forcibly transporting populations of which it wished to rid itself, into or out of occupied territories for the purpose of liquidating them with minimum disturbance of its metropolitan territory, or to provide slave labour or for other inhumane purposes. The genocidal objectives, of which Article 49 was concerned to prevent future repetitions against other peoples, were in part conceived by the Nazi authorities as a means of ridding their Nazi occupant's metropolitan territory of Jews – of making it, in Nazi terms, judenrein. Such practices were, of course, prominent among the offences tried by war crimes tribunals after World War II.

If and insofar, therefore, as Israel's position in Judea and Samaria (the West Bank) is merely that of an occupying power, Article 49 would forbid deportation or transfer of its own population onto the West Bank whenever this action has consequence of serving as a means of either

(1) impairment of the economic situation or racial integrity of the native population of the occupied territory; or

(2) inhuman treatment of its own population.

Impairment of Racial Integrity of the Native Population of the Occupied Territory

The prominence of the question of legality of Jewish settlements on the West Bank reflects the tension of the peace process, rather than the magnitude of any demographic movement. Despite vociferous political warfare pronouncements on both sides, it seems clear, therefore, that no serious dilution (much less extinction) of the separate racial existence of the native population has either taken place or is in prospect. Nor do well-known facts of dramatic improvement in the economic situation of the inhabitants since 1967 permit any suggestion that the situation has been worsened or impaired…

Inhuman treatment of its own population

On that issue, the terms of Article 49(6) however they are interpreted, are submitted to be totally irrelevant. To render them relevant, we would have to say that the effect of Article 49(6) is to impose an obligation on the state of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever judenrein. Irony would thus be pushed to the absurdity of claiming that Article 49(6) designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories judenrein, has now come to mean that Judea and Samaria the West Bank must be made judenrein and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

Part 4

THE PRINCIPLE OF SELF-DETERMINATION

It is sometimes asserted that the principle of self-determination creates a legal obligation for Israel to "give back" the Territories to the Palestinians. Here Stone examines the applicability of the "doctrine of self-determination" to the conflict.

Whether the doctrine is already a doctrine of international law stricto sensu, or (as many international lawyers would still say) a precept of politics, or policy, or of justice, to be considered where appropriate, it is clear that its application is predicated on certain findings of fact. One of these is the finding that at the relevant time the claimant group constitutes a people of nation with a common endowment of distinctive language or ethnic origin or history and tradition, and the like, distinctive from others among whom it lives, associated with particular territory, and lacking an independent territorial home in which it may live according to its lights…

Palestine Liberation Organization (PLO) leaders have frankly disavowed distinct Palestine identity. On March 3, 1977, for example, the head of the PLO Military Operations Department, Zuhair Muhsin, told the Netherlands paper Trouw that there are no differences between Jordanians, Palestinians, Syrians and Lebanese:

> "We are one people. Only for political reasons do we carefully underline our Palestinian identity. For it is of national interest for the Arabs to encourage the existence of the Palestinians against Zionism. Yes, the existence of a separate Palestine identity is there only for tactical reasons. The establishment of a Palestinian State is a new expedient to continue the fight against Zionism and for Arab unity."…

The myth of the 1966 Palestinian Covenant that the Palestinian people was unjustly displaced by the Jewish invasion of Palestine in 1917 is widely disseminated and unquestioningly and dogmatically espoused in studies from the United Nations Secretariat. However, it is necessary to recall, not only the Kingdom of David and the

succession of Jewish polities in Palestine down to Roman conquest and dispersion at the turn of the present era, but also that the Jews continued to live in Palestine even after that conquest, and were in 1914 a well-knit population there. Hundreds of thousands of other Jews, driven from Palestine homeland by successive waves of Roman, Arab, and other conquerors, continued to live on for centuries throughout the Middle East, often under great hardship and oppression. And, of course, millions of others were compelled to move to other parts of the world where too often, as in pogrom-ridden Russia and Poland, they live in conditions of tyrannous and humiliation subjection and under daily threat to their lives…

That the provision for a Jewish national home in Palestine was an application of the principle of self-determination is manifest from the earliest seminal beginning of the principle. The Enquiry Commission, established by President Wilson in order to draft a map of the world based on the Fourteen Points, affirmed the right of the Jewish people that Palestine should become a Jewish State clearly on this ground. Palestine, the commission said, was "the cradle and home of their vital race", the basis of the Jewish spiritual contribution, and the Jews were "the only people whose only home was in Palestine"…

The problem of competing self-determination becomes, indeed, even more difficult, whether for purposes of determining aggression or for other purposes, where the competing claims and accompanying military activities, punctuated by actual wars, armistices, and cease-fire agreements, have been made over protracted historical periods… Is the critical date of the Middle East crisis 1973 or 1967, or the first Arab states' attack on Israel in 1948, or is it at the Balfour Declaration in 1917, or at the Arab invasions and conquest of the seventh century AD, or even perhaps at the initial Israelite conquest of the thirteenth century BC? The priority question, as well as the self-determination question, is difficult enough. They become quite baffling when, in the course of such a long span of time, a later developing claim of self-determination like that of the Palestinian people in the 1960s, arises, and claims to override retrospectively the sovereign statehood of another nation, here the Jewish people, already attained by right of self determination.

Note:

Stone's characterization of the doctrine of self-determination as a "precept of policy, or politics or of justice" has since been clarified in a number of decisions of the International Court of Justice. While the Court has acknowledged the right of various peoples to self-determination as a matter of principle, it has naturally been careful not to confer territorial rights on the basis of self-determination in cases where a sovereign state is in lawful possession of the relevant territory.

In the East Timor Case (1995), for example, the Court refused to consider a claim based on self-determination, since this would require a determination that Indonesia's entry into and continued presence in the territory was unlawful, and Indonesia had not submitted to the Court's jurisdiction.

Stone's observations on the competing Jewish and Palestinian claims of self-determination in respect of the whole of historical Palestine were, of course, made at a time when the phrase "the inalienable rights of the Palestinian people" was still a coded reference to the projected destruction of Israel, and before the Oslo Accords incorporated the first Palestinian acceptance of the concept of compromise by partition. As an example of the way in which the principles of pan-Arab national self-determination then applied to Israel, Stone cited:

> a letter dated February 20, 1980 to the Secretary-General, transmitted for UN circulation to the General Assembly and the Security Council in connection with item 26 of A/35/11000-S/13816 (Situation in the Middle East) [which] declared a propos of inclusion in the Charter of a principle of non-use of force:
>
> > "The principle of non-use of force shall apply to the relations of the Arab Nation and Arab States with the nations and countries neighbouring the Arab homeland. Naturally, as you know, the Zionist entity is not included, because the Zionist entity is not considered a State, but a deformed entity occupying an Arab territory. It is not covered by these principles."

The critical question at the time of writing is therefore whether the legal framework of a peace process based on historic compromise can survive the breakdown of the permanent status negotiations at Camp David II and Taba, the ensuing violent conflict, and the widespread revival of pan-Arab and Islamic ideologies which reject such compromise.

Part 5

THE LEGAL EFFECT OF THE "PEACE PROCESS"

Extracts from Documents 1993-2003 with Notes

DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS
September 13, 1993

The "Oslo Accords" (the "DOP") contemplated the negotiation of a final peace settlement within an anticipated period of five years, during which successive interim measures would be implemented. These measures included an interim transfer of autonomous powers to a Palestinian self-governing Authority, and the "re-deployment" of Israeli military forces within the Territories out of populated areas, on the terms which were negotiated in the later agreements extracted below.

Article I
Aim of the Negotiations

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338…

Article XIII
Redeployment of Israeli Forces

> 2. In redeploying its military forces, Israel will be guided by the principle that its military forces should be redeployed outside populated areas.
>
> 3. Further redeployments to specified locations will be gradually implemented commensurate with the assumption of responsibility for public order and internal security by the Palestinian police force…

TREATY OF PEACE BETWEEN THE STATE OF ISRAEL AND THE HASHEMITE KINGDOM OF JORDAN

October 26, 1994

Following the negotiation of the Oslo Accords, the Peace Treaty between Israel and Jordan incorporated a renunciation by Jordan of its former claim to sovereignty over the "West Bank" of the Jordan river. The definition of the border is therefore qualified by the words "without prejudice to the status of any territories that came under Israeli military control in 1967".

Article 3 International Boundary

2. The boundary, as set out in Annex I (a), is the permanent, secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967…

Annex I (a)

2. The boundary is delimited as follows:

…The boundary line shall follow the middle of the main course of the flow of the Jordan and Yarmouk Rivers…

ISRAELI-PALESTINIAN INTERIM AGREEMENT ON THE WEST BANK AND THE GAZA STRIP
Washington, D.C., September 28, 1995

This Agreement superseded the previous agreements which comprised the first stages of the "peace process" under the Oslo Accords. It was re-affirmed in the subsequent documents, and as at 2003 it remains the operative document of the process.

The Agreement provided for the replacement of Israel's governmental institutions in the Territories by the Palestinian Authority, and the transfer of all government powers to that Authority, with the exception of those powers specifically reserved to Israel.

Significantly for determining the current status of the Territories, the Agreement is described as an "Interim Agreement". It is expressed to be for a term not exceeding five years, and it contains a provision preserving existing rights.

Articles X and XII (1), gives Israel "all the powers necessary" to meet its "responsibility for overall security of Israelis and Settlements".

RECOGNIZING that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority … for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years…leading to a permanent settlement based on Security Council Resolutions 242 and 338…

Article I
Transfer of Authority …

5. After the inauguration of the Council, the Civil Administration in the West Bank will be dissolved, and the Israeli military government shall be withdrawn. The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council…

Article X
4. Israel shall continue to carry the responsibility for external security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.

Article XI
Land

1. The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period…

2. The two sides agree that West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations, will come under the jurisdiction of the Palestinian Council in a phased manner… as specified below:

a. Land in populated areas (Areas A and B)…will come under the jurisdiction of the Council during the first phase of redeployment.

b. All civil powers and responsibilities, including planning and zoning, in Areas A and B …will be transferred to and assumed by the Council during the first phase of redeployment.

c. In Area C, during the first phase of redeployment Israel will transfer to the Council civil powers and responsibilities not relating to territory …

Article XII
Arrangements for Security and Public Order

1. …Israel shall continue to carry the responsibility for defence against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defence against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility.

3. Except for the Palestinian Police and the Israeli military forces, no other armed forces shall be established or operate in the West Bank and the Gaza Strip.

4. Except for the arms, ammunition and equipment of the Palestinian Police described in Annex I, and those of the Israeli military forces, no organization, group or individual in the West Bank and the Gaza Strip shall manufacture, sell, acquire, possess, import or otherwise introduce into the West Bank or the Gaza Strip any firearms, ammunition, weapons, explosives, gunpowder or any related equipment, unless otherwise provided for in Annex I.

ARTICLE XIII
Security

l. The Council will, upon completion of the redeployment of Israeli military forces in each district…assume the powers and responsibilities for internal security and public order in Area A in that district.

2. a. There will be a complete redeployment of Israeli military forces from Area B. Israel will transfer to the Council and the Council will assume responsibility for public order for Palestinians. Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.

Article XV
Prevention of Hostile Acts

1. Both sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority and against their property and shall take legal measures against offenders.

Article XXII
Relations between Israel and the Council

1. Israel and the Council shall seek to foster mutual understanding and tolerance and shall accordingly abstain from incitement, including hostile propaganda, against each other and, without derogating from the principle of freedom of expression, shall take legal measures to prevent such incitement by any organizations, groups or individuals within their jurisdiction.

2. Israel and the Council will ensure that their respective educational systems contribute to the peace between the Israeli and Palestinian peoples and to peace in the entire region, and will refrain from the introduction of any motifs that could adversely affect the process of reconciliation…

Article XXXI
Final Clauses…

5. Permanent status negotiations will commence as soon as possible, but not later than May 4, 1996, between the Parties. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest

6. Nothing in this Agreement shall prejudice or pre-empt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions

THE "ROADMAP"
30 April 2003

The Roadmap is not embodied in any instrument signed or formally ratified by either party. Its terms are set out in a press statement issued by the US Department of State on 30 April 2003.

On 25 May 2003 the Israeli cabinet passed a resolution by 12 votes to 7, with 4 abstentions, agreeing to "accept the steps set out in the roadmap". That agreement followed 14 "reservations" conveyed to the US government, and was made on the basis of a US commitment to "fully and seriously address Israel's comments to the roadmap during the implementation stage."

A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict

The following is a performance-based and goal-driven roadmap, with clear phases, timelines, target dates, and benchmarks aiming at progress through reciprocal steps by the two parties…

A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbours. The settlement will resolve the Israel-Palestinian conflict, and end the occupation that began in 1967, based on the foundations of the Madrid Conference, the principle of land for peace, UNSCRs 242, 338 and 1397, agreements previously reached by the parties, and the initiative of Saudi Crown Prince Abdullah — endorsed by the Beirut Arab League Summit — calling for acceptance of Israel as a neighbour living in peace and security, in the context of a comprehensive settlement…

Phase I: Ending Terror and Violence, Normalizing Palestinian Life, and Building Palestinian Institutions — Present to May 2003…

Palestinians declare an unequivocal end to violence and terrorism and undertake visible efforts on the ground to arrest, disrupt, and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere.

Rebuilt and refocused Palestinian Authority security apparatus begins sustained, targeted, and effective operations aimed at confronting all those engaged in terror and dismantlement of terrorist capabilities and infrastructure. This includes commencing confiscation of illegal weapons and consolidation of security authority, free of association with terror and corruption…

Phase II: Transition: June 2003-December 2003
In the second phase, efforts are focused on the option of creating an independent Palestinian state with provisional borders and attributes of sovereignty…

Progress into Phase II will be based upon the consensus judgment of the Quartet of whether conditions are appropriate to proceed, taking into account performance of both parties…

Phase III: Permanent Status Agreement and End of the Israeli-Palestinian Conflict 2004—2005

Progress into Phase III, based on consensus judgment of Quartet, and taking into account actions of both parties and Quartet monitoring. Phase III objectives are consolidation of reform and stabilization of Palestinian institutions, sustained, effective Palestinian security performance, and Israeli-Palestinian negotiations aimed at a permanent status agreement in 2005…

Israel's Reservations

1… As a condition for progress to the second phase, the Palestinians will complete the dismantling of terrorist organizations (Hamas, Islamic Jihad, the Popular Front, the Democratic Front, Al-Aqsa Brigades and other apparatuses) and their infrastructure [and] collection of all illegal weapons and their transfer to a third party for the sake of being removed from the area and destroyed…

6… Declared references must be made to Israel's right to exist as a Jewish state and to the waiver of any right of return for Palestinian refugees to the State of Israel…

10. The removal of references other than 242 and 338 (1397, the Saudi Initiative and the Arab Initiative adopted in Beirut). A settlement based upon the road map will be an autonomous settlement that derives its validity therefrom. The only possible reference

should be to Resolutions 242 and 338, and then only as an outline for the conduct of future negotiations on a permanent settlement…

The reference to "the Arab Initiative adopted in Beirut" is to the Beirut Declaration of 28 March 2002. That Declaration called for "complete withdrawal from the occupied Arab territories, including the Syrian Golan Heights, to the 4 June 1967 line", a "solution to the problem of Palestinian refugees…in accordance with UNGA Resolution 194" and a Palestinian State "with East Jerusalem as its capital." It also "emphasise[d] the distinction between international terrorism and the peoples' legitimate right to resist foreign occupation".

The Palestinian Response

Palestinian Prime Minister Mahmoud Abbas rejected the reservations:

"We are saying to the Israelis, 'follow the map and don't waste time haggling over details'. We must get into the implementation phase," Abbas said… "In any case nobody will pay any attention to this or that reservation." [Report in Ha'aretz.]

In this context, if the Roadmap were to be regarded as creating international obligations analogous to treaty obligations, then Article 21 of the Vienna Convention on the Law of Treaties would be relevant. This provides:

> 1. A reservation established with regard to another party…modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation…
>
> 3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

The result would then be that the Roadmap would be binding only as modified by the reservations. Indeed subsequent Israeli statements have re-iterated the government's commitment to the map on that basis.

In the absence of formal documentation, however, it appears that the Roadmap should be characterized as a guide for the implementation of the Oslo agreements, rather than as a modifying agreement.

Part 6

ARAB REFUGEES AND THE "RIGHT OF RETURN"

Extracts from Relevant Instruments

A central reason for the failure of the final status negotiations at Camp David II in July 2000 and at Taba in January 2001 was a Palestinian insistence that Israel should recognise that the Arab refugees of 1947-1948 and their descendants have a "right of return" into Israel. As at the date of writing this remains a central Palestinian demand.

Estimates of the number of refugees who left their homes in Israel in 1947-1948 vary from 419,000, calculated on the basis of numbers before and after the exodus, to

726,000, based on UNRWA relief figures.

As at 1996 UNRWA registered over four and a half million people as Palestinian refugees and their descendants, as follows:

West Bank 1.2m.
Gaza 880,000
Jordan 1.8m.
Lebanon 372,700
Syria 352,100

Some of the refugees still face hardship as a result of the refusal of their host nations to grant them citizenship or equal economic rights. Obviously repatriation into Israel of a large and hostile population is not a realistic proposition. However the question is whether international law places Israel under any legal obligation to accept such a right of return.

Extracts from the relevant international instruments, with notes, appear below.

CONVENTION RELATING TO THE STATUS OF REFUGEES, 1951

The Convention defines the term "refugee" and prescribes the rights granted to refugees in general under international law.

Article 1. – Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it…

[Note: This definition assumes a factual situation of a different character to that of those Palestinians who actively seek to return to the country of their former residence.]

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; …

[Note: This excludes those Palestinians who have taken Jordanian citizenship.]

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance…

[Note: This excludes Palestinians registered with UNRWA.]

Article 33. – Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[Note: This is the critical right created by the Convention. It is relevant only to any Palestinian who might seek protection against being returned to Israel or the Territories. Conversely, the Convention does not include any right to compel the for